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06 UNITED STATES DISTRICT COURT  
07 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

08 STEVEN T. LAFFOON, )  
09 Plaintiff, ) CASE NO. C10-1887-MJP  
10 v. ) REPORT AND RECOMMENDATION  
11 MICHAEL J. ASTRUE, Commissioner of )  
Social Security, )  
12 Defendant. )  
13 \_\_\_\_\_ )

14 Plaintiff Steven T. Laffoon appeals the final decision of the Commissioner of the Social  
15 Security Administration (“Commissioner”) which denied his application for Disability  
16 Insurance Benefits (“DIB”) under Title II of the Social Security Act, 42 U.S.C. §§ 401-433,  
17 after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below,  
18 the Court recommends that the Commissioner’s decision be REVERSED and REMANDED  
19 for further administrative proceedings.

20 I. FACTS AND PROCEDURAL HISTORY

21 Plaintiff was born in 1969 and was 40 years old at the time of the hearing before the  
22 ALJ. (Administrative Record (“AR”) at 124.) He has a high school education and training in

01 telephony. (AR 149.) His past work experience includes employment as a project manager,  
02 design engineer, and maintenance supervisor. (AR 167.) Plaintiff asserts that he is disabled  
03 due to affective disorder, anxiety related disorder, and alcohol dependence. (AR 21, 142.)  
04 He asserts an onset date of November 1, 2007. (AR 21.)

05 The Commissioner denied plaintiff's claim initially and on reconsideration. (AR  
06 68-69.) Plaintiff requested a hearing before an ALJ which took place on February 2, 2010.  
07 (AR 81-82, 32-67.) The ALJ heard testimony from plaintiff, and vocational expert Brian S.  
08 Sorenson. (AR 32-67.) On April 1, 2010, the ALJ issued a decision finding plaintiff not  
09 disabled. (AR 18-27.)

10 Plaintiff's administrative appeal of the ALJ's decision was denied by the Appeals  
11 Council (AR 1-3), making the ALJ's ruling the "final decision" of the Commissioner as that  
12 term is defined by 42 U.S.C. § 405(g). On November 18, 2010, plaintiff timely filed the  
13 present action challenging the Commissioner's decision. (Dkt. 1.)

## 14 II. JURISDICTION

15 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§  
16 405(g) and 1383(c)(3).

## 17 III. DISCUSSION

18 The Commissioner follows a five-step sequential evaluation process for determining  
19 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it  
20 must be determined whether a claimant is gainfully employed. The ALJ found plaintiff had  
21 not engaged in substantial gainful activity since November 1, 2007, the alleged onset date.  
22 (AR 20.) At step two, it must be determined whether a claimant suffers from a severe

01 impairment. The ALJ found plaintiff had the following severe impairments: affective  
02 disorder, anxiety related disorder, and alcohol dependence. (AR 21.) Step three asks whether  
03 a claimant's impairments meet or equal a listed impairment. The ALJ found when the effects  
04 of plaintiff's alcohol use are considered the severity of plaintiff's impairments meets sections  
05 12.04, 12.06, and 12.09. (AR 21-22.)

06 The ALJ then considered plaintiff's claim without consideration of his alcohol use.  
07 The ALJ found if plaintiff stopped his alcohol use, he would continue to have a severe  
08 impairment or combination of impairments. (AR 22.) The ALJ found if plaintiff stopped his  
09 alcohol use, he would not have an impairment or combination of impairments that met or  
10 equaled a listing. *Id.* If the claimant's impairments do not meet or equal a listing, the  
11 Commissioner must assess residual functional capacity ("RFC") and determine at step four  
12 whether the claimant has demonstrated an inability to perform past relevant work. The ALJ  
13 found if plaintiff stopped his alcohol use, he would have the RFC to perform work at all  
14 exertional levels involving simple, routine tasks with occasional public contact. (AR 23.)  
15 The ALJ found if plaintiff stopped his alcohol use, he would be unable to perform his past  
16 relevant work. (AR 25.) If the claimant is able to perform his past relevant work, he is not  
17 disabled; if the opposite is true, then the burden shifts to the Commissioner at step five to show  
18 that the claimant can perform other work that exists in significant numbers in the national  
19 economy, taking into consideration the claimant's RFC, age, education, and work experience.  
20 20 C.F.R. §§ 404.1520(g), 416.920(g); *Tackett v. Apfel*, 180 F.3d 1094, 1099-1100 (9th Cir.  
21 1999). The ALJ found if plaintiff stopped his alcohol use, there would be a significant number  
22 of jobs in the national economy that he could perform. (AR 25.)

01 The ALJ concluded that plaintiff's substance use disorder was a contributing factor  
02 material to the determination of disability, and that he was not disabled within the meaning of  
03 the Act at any time from the alleged onset date through the date of the decision. (AR 26.)

04 Plaintiff argues that the ALJ erred in (1) finding his alcohol use was a material factor,  
05 (2) evaluating the medical opinion evidence, (3) evaluating his credibility, (4) evaluating his  
06 RFC, and (5) failing to include all of his limitations in a hypothetical to the vocational expert.<sup>1</sup>  
07 (Dkt. No. 17.) Plaintiff also argues that the Appeals Council erred by failing to remand his  
08 case based on new evidence submitted to the Appeals Council but not reviewed by the ALJ.  
09 *Id.* He requests remand for an award of benefits, or, alternatively, further administrative  
10 proceedings. *Id.* at 22. The Commissioner argues that the ALJ's decision is supported by  
11 substantial evidence and should be affirmed. (Dkt. No. 18.) For the reasons described below,  
12 the Court agrees with plaintiff.

13 A. Drug Abuse and Alcoholism Materiality

14 A social security claimant is not entitled to benefits "if alcoholism or drug addiction  
15 would . . . be a contributing factor material to the Commissioner's determination that the  
16 individual is disabled." 42 U.S.C. § 423(d)(2)(C). Therefore, where relevant, an ALJ must

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18 <sup>1</sup> Plaintiff's opening brief contains a lengthy (over twelve pages) recitation of evidence.  
19 Plaintiff's counsel is reminded that such recitation is unnecessary and, in fact, discouraged.  
20 (See Dkt. No. 12 at 2.) Rather, a discussion of the relevant facts and portions of the  
21 administrative record should be conducted in the context of specific assignments of error. In  
22 addition, plaintiff's counsel is reminded to abide by the formatting requirements outlined in  
Local Rule CR 10. See *id.* In particular, "[t]he text of any typed or printed brief must be 12  
point or larger and must . . . be double spaced." Local Rule CR 10(e) (emphasis added).  
Pleadings which fail to comply with any provision of the Court's Local Rules may result in the  
pleading being stricken without further notice.

01 conduct a drug abuse and alcoholism (“DAA”) analysis and determine whether a claimant’s  
02 disabling limitations remain absent the use of drugs or alcohol. 20 C.F.R. §§ 404.1535,  
03 416.935. That is, the ALJ must first identify disability under the five-step procedure and then  
04 conduct a DAA analysis to determine whether substance abuse is material to disability.  
05 *Bustamante v. Massanari*, 262 F.3d 949, 955 (9th Cir. 2001). If the remaining limitations  
06 without DAA would still be disabling, then the claimant’s drug addiction or alcoholism is not a  
07 contributing factor material to his disability. If the remaining limitations would not be  
08 disabling without DAA, then the claimant’s substance abuse is material and benefits must be  
09 denied. *Parra v. Astrue*, 481 F.3d 742, 747-48 (9th Cir. 2007).

10 Plaintiff bears the burden of proving that DAA is not a contributing factor material to  
11 his disability. *Id.* To do so, plaintiff must establish that his disability continues to be severe  
12 even in periods of sobriety. *Id.* If plaintiff cannot establish that his DAA is not material, then  
13 the ALJ must repeat the five-step sequential evaluation process for determining whether  
14 plaintiff is disabled, absent the limiting effects of DAA. *Id.*

15 As required under the regulations, after finding plaintiff disabled when alcohol abuse  
16 was considered, the ALJ then considered whether plaintiff would be disabled absent the alcohol  
17 abuse. (AR 22-26.) As part of this evaluation, the ALJ considered the June 2008 report of  
18 examining psychologist Linda Jansen, Ph.D., the June 2009 through January 2010 medical  
19 records from treating psychologist W. Allen Hume, Ph.D., and the 2008 opinions of state  
20 agency psychologists Edward Beaty, Ph.D., and Mary A. Gentile, Ph.D. (AR 24-25.) The  
21 ALJ found this medical evidence supported his conclusion that plaintiff had normal cognitive  
22 abilities when he was abstinent from alcohol and, therefore, would not be disabled if he stopped

01 using alcohol. (AR 24-26.)

02 Plaintiff argues that the ALJ's conclusion is not supported by substantial evidence and  
03 is based on the ALJ's legal errors in failing to properly evaluate the medical evidence and his  
04 testimony. (Dkt. No. 17 at 14-19, Dkt. No. 19 at 2.) He avers that it was impossible to  
05 separate the degree of restriction resulting from his alcohol abuse from his other mental  
06 impairments prior to January 2010 because he had no periods of abstinence prior to that time.  
07 To support his claim, plaintiff relies on a 1996 internal agency document, Emergency Teletype  
08 No. EM-96200, which states in part: "[w]hen it is not possible to separate the mental  
09 restrictions and limitations imposed by DAA and the various other mental disorders shown by  
10 the evidence, a finding of 'not material' would be appropriate." Emergency Teletype No.  
11 EM-96200, <http://policy.ssa.gov>.

12 The Ninth Circuit, however, rejected a related internal agency document in *Parra*,  
13 which stated, in part, "'where the MC/PC [medical consultant/psychological consultant] cannot  
14 project what limitations would remain if the individuals stopped using drugs/alcohol,' the  
15 MC/PC 'should record his/her findings to that effect' and 'the DE will find that DAA is not a  
16 contributing material factor to the determination of disability.'" *Parra*, 481 F.3d at 749, n. 5  
17 (quoting Emergency Teletype No. EM-96-94). The Ninth Circuit reasoned that internal  
18 agency documents such as these do not carry the force of law, are not binding on the agency,  
19 and do not create judicially enforceable duties. *Id.* at 749. In addition, the Court found the  
20 agency interpretation contradicted the purpose of the Contract with America Advancement Act  
21 ("CAAA") which was "'to discourage alcohol and drug abuse, or at least not to encourage it  
22 with a permanent government subsidy.'" *Id.* at 749-50 (quoting *Ball v. Massanari*, 254 F.3d

01 817, 824 (9th Cir. 2001)). The Court further reasoned,

02 An alcoholic claimant who presents inconclusive evidence of materiality has no  
03 incentive to stop drinking, because abstinence may resolve his disabling limitations  
04 and cause his claim to be rejected or his benefits terminated. His claim would be  
guaranteed only as long as his substance abuse continues – a scheme that  
effectively subsidizes substance abuse in contravention of the statute’s purpose.

05 *Id.* at 750. The Ninth Circuit concluded that insufficient evidence as to the issue of materiality  
06 is insufficient to satisfy the plaintiff’s burden of proving his alcoholism was not a material  
07 factor. *Id.* Thus, contrary to plaintiff’s contention, internal agency documents, such as  
08 Emergency Teletype EM-96200, do not create judicially enforceable duties and the Court does  
09 not review allegations of noncompliance with their provisions. *See Parra*, 481 F.3d at 749.

10 Nevertheless, the Court agrees with plaintiff that the ALJ’s conclusion that plaintiff  
11 would not be disabled if he stopped using alcohol is not supported by substantial evidence. To  
12 the contrary, none of the medical evidence identified by the ALJ sufficiently addressed whether  
13 plaintiff would remain disabled if he stopped drinking.

14 First, the ALJ highlighted the June 18, 2008, Psychological – Memory Assessment of  
15 consultative examiner Linda Jansen, Ph.D. (AR 24, 348-51.) The ALJ stated,

16 Linda Jansen, PhD, noted that given the claimant’s relatively stable history of  
17 employment prior to the onset of his latest symptoms, it appeared that his current  
18 level of memory functioning was impaired from his previous functioning. The  
19 claimant reported drinking six or eight beers a night at this evaluation. The  
20 evidence suggests that his decreased functioning is associated with his alcohol use.  
21 Dr. Jansen’s opinion regarding the claimant’s functioning is associated with his  
alcohol use. Dr. Jansen’s opinion regarding the claimant’s functioning as  
discussed above, is thus given little weight when assessing his functioning without  
alcohol abuse. The claimant’s previous ability to maintain employment with  
psychiatric impairments suggests that he would be able to do so if he discontinued  
alcohol abuse.

22 (AR 24.) While the ALJ accepted Dr. Jansen’s findings as supportive of his decision, he

01 rejected her opinion regarding plaintiff's functioning without alcohol abuse, finding "the  
02 evidence suggests that his decreased functioning is associated with his alcohol use." *Id.*  
03 Regardless of whether the ALJ's statements accurately reflect Dr. Jansen's findings, nothing in  
04 her report indicates that plaintiff's decreased functioning was associated with his alcohol abuse.  
05 While the record indicates that plaintiff maintained gainful employment until November 1,  
06 2007, the record also indicates that plaintiff admitted to drinking heavily for more than fifteen  
07 years. (AR 214, 217, 378, 435, 461.) Based on her findings, Dr. Jansen diagnosed plaintiff  
08 with panic disorder, obsessive-compulsive disorder, major depressive disorder, and alcohol  
09 abuse. (AR 351.) Her global assessment of functioning ("GAF") score was 40.<sup>2</sup> Nowhere  
10 in Dr. Jansen's findings did she indicate expressly or implicitly that plaintiff's recent decreased  
11 functioning was associated with his alcohol abuse. Because Dr. Jansen did not make this  
12 finding, the ALJ's seeming reliance on her report for this conclusion was unjustified. The  
13 ALJ's presumption that plaintiff would be able to maintain employment if he discontinued his  
14 alcohol abuse is suspect at best.

15 Next the ALJ turned to the medical records from plaintiff's treating psychologist W.  
16 Allen Hume, dated June 2009 through January 2010. (AR 395-422, 212-13, 434-57.) On  
17 June 23, 2009, Dr. Hume diagnosed plaintiff with bipolar disorder, panic disorder, alcohol

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19 2 The GAF score is a subjective determination based on a scale of 1 to 100 of "the  
20 clinician's judgment of the individual's overall level of functioning." American Psychiatric  
21 Ass'n, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000). A GAF score of  
22 31-40 indicates "[s]ome impairment in reality testing or communication (e.g., speech is at times  
illogical, obscure, or irrelevant) OR major impairment in several areas, such as work or school,  
family relations, judgment, thinking, or mood (e.g., depressed man avoids friends, neglects  
family, and is unable to work; child frequently beats up younger children, is defiant at home,  
and is failing at school)." *Id.*



01 dependence, and nicotine dependence. (AR 396, 421.) His GAF score was 51, indicating  
02 “[m]oderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) OR  
03 moderate difficulty in social, occupational, or school functioning (e.g., few friends, conflicts  
04 with peers or co-workers).” (AR 396.) The ALJ highlighted an October 2009 progress report  
05 of their sessions which noted that plaintiff “reported continued drinking and psychological  
06 symptoms,” and stated that plaintiff was “clearly suffering from a co-occurring mood/anxiety  
07 disorder and alcohol dependence.” (AR 24, 401.) Dr. Hume reported that plaintiff  
08 “continues to exhibit symptoms of bipolar disorder along with panic attacks, depression and  
09 generalized anxiety.” (AR 401.) Dr. Hume noted, “I am concerned that his alcohol usage is  
10 worsening and perhaps causing many of his symptoms.” (AR 24, 401.) The ALJ gave this  
11 opinion “significant weight,” finding it “consistent with other objective medical evidence  
12 which demonstrates the claimant’s impairments will improve when he stops abusing alcohol.”  
13 (AR 24.) The ALJ did not identify what objective medical evidence he was referring to.

14 On January 28, 2010, Dr. Hume prepared a letter indicating that plaintiff had been sober  
15 for eight days. (AR 24, 422.) The letter stated,

16 I am writing this letter on behalf of Mr. Steven Todd Laffoon, a psychotherapy  
17 client with whom I have counseled since 6/23/09 for a myriad of co-occurring  
18 disorders. Mr. Laffoon has a very long-standing history of psychiatric illness that  
19 records indicate began prior to 1991, including panic, anxiety/OCD, and depressive  
20 disorders. In addition he developed a significant alcohol problem, which was  
21 initially attributed to attempts at self-medication of psychiatric symptoms  
22 approximately 15 years ago. On 1/14/10, he reportedly weaned himself of alcohol  
and proudly reported one day sober, with a plan to remain alcohol free. As of  
today, 1/28/10, he has been sober for 8 days. We discussed ways in which to  
accomplish sustained sobriety, including entering into a recovery program such as  
intensive outpatient therapy, which he plans to do, and AA. He will need  
significant sober, social support in order to remain alcohol free. In addition,  
sobriety will allow him a better opportunity to further address his long standing

01 psychiatric issues, particularly the panic and depressive symptoms he has suffered  
02 most of his life.

03 At this time, it is my professional opinion that Mr. Laffoon is unable to secure and  
04 maintain any form of gainful employment due to his psychiatric illness. If he  
05 remains sober he will have an improved chance of addressing psychiatric  
06 symptoms in the future.

07 (AR 422.) The ALJ gave Dr. Hume's opinion that plaintiff was unable to secure and maintain  
08 gainful employment due to his psychiatric illnesses "no weight," stating that "the evidence  
09 demonstrates that with abstinence from alcohol use, his functioning will improve." (AR 25.)  
10 Again, the ALJ did not identify what evidence he was referring to. While the ALJ rejected this  
11 opinion, the ALJ accepted Dr. Hume's opinion contained in the same letter that "if plaintiff  
12 remained sober, he believed he would have an improved chance of addressing his psychiatric  
13 symptoms." (AR 25.)

14 A treating physician's opinion is generally due "controlling weight," 20 C.F.R. §  
15 404.1527(d)(2), and can only be rejected if the ALJ provides "clear and convincing" reasons if  
16 that opinion is not contradicted by other evidence, and "specific and legitimate" reasons if it is.  
17 *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). Here, the ALJ stated that the treating  
18 physician's opinions were inconsistent with the other objective medical evidence. (AR 25.)  
19 The ALJ did not identify the objective medical evidence to which he was referring, however.  
20 "[C]onclusory reasons will not justify an ALJ's rejection of a medical opinion." *Regennitter v.*  
21 *Comm'r of Soc. Sec.*, 166 F.3d 1294, 1299 (9th Cir. 1999). Moreover, the ALJ's reliance on  
22 portions of Dr. Hume's letter purportedly supporting his disability determination, while  
rejecting those portions that did not, runs afoul of the general rule that an ALJ is not entitled to  
pick and choose through a physician's opinion. See, e.g., *Robinson v. Barnhart*, 366 F.3d

01 1078, 1083 (10th Cir. 2004) (“The ALJ is not entitled to pick and choose from a medical  
02 opinion, using only those parts that are favorable to a finding of nondisability.”); *Switzer v.*  
03 *Heckler*, 742 F.2d 382, 385-86 (7th Cir.1984) (“[T]he Secretary’s attempt to use only the  
04 portions [of a report] favorable to her position, while ignoring other parts, is improper.”). The  
05 Commissioner, in his brief, attempts to justify the ALJ’s rejection of Dr. Hume’s opinions;  
06 however, such a recitation is purely conjecture upon the part of counsel and cannot serve as the  
07 basis for review by a court. *Bray v. Comm’r of SSA*, 554 F.3d 1219, 1225 (9th Cir. 2009)  
08 (counsel’s *post hoc* rationalizations are not substituted for the reasons supplied by the ALJ).

09 The ALJ also relied on the opinions of the state agency medical consultants, Edward  
10 Beaty, Ph.D., and Mary A. Gentile, Ph.D., who opined that plaintiff had normal cognitive  
11 abilities when he abstained from alcohol. (AR 25, 360-62, 365.) However, “[t]he opinion of  
12 a nonexamining physician cannot by itself constitute substantial evidence that justifies the  
13 rejection of the opinion of either an examining physician *or* a treating physician.” *Lester v.*  
14 *Chater*, 81 F.3d 821, 831 (9th Cir. 1996). Accordingly, the ALJ erred in rejecting Dr. Jansen’s  
15 and Dr. Hume’s opinions in favor of the non-examining, consulting psychologists’ opinions  
16 absent a legally sufficient explanation for doing so. Because the ALJ’s decision is not  
17 supported by substantial evidence, remand is warranted.

18 Plaintiff also points to evidence submitted to the Appeals Council after the ALJ’s April  
19 2010 decision, including progress notes and an opinion letter from Dr. Hume, a toxicology  
20 report, and a neuropsychological evaluation performed by Edwin L. Hill, Ph.D. (AR 434-70.)  
21 He argues that the Appeals Council erred by failing to remand his claim for a new hearing in  
22 light of this new evidence which showed that his anxiety and depression continued to cause

01 marked limitations more than four months after he stopped using alcohol. (Dkt. No. 17 at 16.)

02 On May 27, 2010, Dr. Hume prepared a letter stating, in part, as follows:

03 Mr. Laffoon has a very long-standing history of psychiatric illnesses that records  
04 indicate began prior to 1991, including panic attacks, anxiety/OCD, and depressive  
05 disorders. In addition, he developed a significant alcohol problem which began at  
06 age 25, many years after the development of impairing psychiatric syndromes. . . .  
07 On 1/15/10, he reportedly weaned himself off alcohol, entered an intensive  
08 outpatient chemical dependency program which he is about to finish, and reported  
09 that he has remained sober for more than 4 months. He attends at least 2 AA  
10 meetings per week at this time in addition to required groups in his alcohol  
11 treatment program. In order to support his ongoing recovery, we have begun to  
12 meet two times per week, which we plan to do for the foreseeable future, with the  
13 goals of relapse prevention, addressing his ongoing depression and anxiety/panic  
14 symptoms, the latter panic which has resulted in him having difficulties leaving his  
15 home, driving more than a mile from home, and refraining from going places where  
16 there are many people (i.e., grocery store, Home Depot, etc.)

17 Since obtaining sobriety, he has exhibited an increase in anxiety and panic  
18 symptoms, for which he is attempting to manage with both medications and  
19 non-pharmalogical interventions (AA, self talk, and family support). Objective  
20 personality assessment (Millon Clinical Multiaxial Inventory – III) verifies that he  
21 is experiencing a significant mental disorder (recurrent severe mood disorder). He  
22 has also complained more about cognitive dysfunction, including difficulty with  
memory, attention/concentration, following through on needed tasks, and other  
executive functioning.

...  
At this time, it is my continued professional opinion that Mr. Laffoon is unable to  
secure and maintain any form of gainful employment due to his current psychiatric  
illnesses. He has been sober for 4 plus months, but continues to exhibit  
significantly debilitating symptoms, including cognitive complaints.

18 (AR 435-36.)

19 In June 2010, Dr. Hill conducted a comprehensive neuropsychological evaluation of the  
20 plaintiff. (AR 459-68.) He found “significant evidence of considerable impairment in  
21 plaintiff’s executive functioning capabilities, attention and concentration skills, memory and  
22 learning abilities, and speed of information processing.” (AR 468.) Dr. Hill opined,

01 Despite nearly five months of sobriety and abstinence from all alcohol use, he is  
02 having difficulties maintaining attention and concentration, maintaining pace and  
03 persistence, understanding and retaining new information, adapting to change in his  
04 environment, and communicating effectively and appropriately with other people.  
05 While he has longstanding problems with anxiety, panic, depression, and  
06 irritability that do not appear to be under optimal control, the decline in his  
07 cognitive functioning is of great concern. While the emotional problems he has  
08 could be exacerbating his cognitive problems, he may have some underlying  
09 neurological disease associated with some kind of dementia. Further neurological  
10 examination appears warranted. The prognosis for improvement in his condition  
11 appears poor given that he continues to evidence problems in his cognitive abilities  
12 during the past 2 years without sign of significant improvement. He needs further  
13 psychiatric and psychological care including medication management, but does not  
14 appear to be capable of maintaining gainful employment in the competitive  
15 marketplace at the present time.

16 *Id.*

17 The Commissioner argues that the Court may remand the case for the ALJ to consider  
18 evidence first submitted to the Appeals Council only upon a showing the plaintiff had good  
19 cause not to submit the evidence to the ALJ. (Dkt. No. 18 at 10.) The Commissioner relies on  
20 cases relating to “sentence six” of 42 U.S.C. § 405(g), which states that “[t]he court . . . may at  
21 any time order additional evidence to be taken before the Commissioner . . . , but only upon a  
22 showing that there is new evidence which is material and that there is good cause for the failure  
to incorporate such evidence into the record in a prior proceeding.” *Id.*

However, as this Court has previously indicated, Ninth Circuit precedent strongly  
supports the proposition that evidence submitted to the Appeals Council becomes part of the  
administrative record for the purposes of review; *see Harman v. Apfel*, 211 F.3d 1172, 1180-81  
(9th Cir. 2000) (additional evidence submitted to the Appeals Council may be considered  
because the Appeals Council addressed them in the context of denying plaintiff’s request for

01 review); *Gomez v. Chater*, 74 F.3d 967, 971 (9th Cir. 1996) (evidence submitted to the Appeals  
02 Council is part of the record on review to federal court); *Ramirez v. Shalala*, 8 F.3d 1449,  
03 1451-52 (9th Cir. 1993) (holding that a reviewing court should consider both the ALJ's  
04 decision and any additional material submitted to the Appeals Council); and that a plaintiff need  
05 not show such evidence is material and that there is good cause for the failure to incorporate it  
06 into the record previously. Instead, such evidence is reviewed pursuant to "sentence four" of  
07 42 U.S.C. § 405(g) which provides that a "Court shall have power to enter, upon the pleadings  
08 and transcript of the record, a judgment affirming, modifying, or reversing the decision of the  
09 Commissioner . . . with or without remanding the cause for a rehearing." See *Ramel v.*  
10 *Barnhart*, No. C05-1913-RSL-MAT, slip op. at 11-14 (W.D. Wash. Aug. 4, 2006) (Dkt. No.  
11 18). The Commissioner cites no authority for the proposition that materiality or good cause is  
12 required for a district court to consider evidence within the record. Consequently, this Court  
13 may remand for consideration of the additional evidence submitted to the Appeals Council  
14 without a showing of materiality or good cause.

15 In sum, the Court concludes that the ALJ failed to properly determine what limitations  
16 would remain if plaintiff abstained from alcohol abuse. Furthermore, evidence developed  
17 after the ALJ's decision suggests that significant mental limitations may exist independently of  
18 his alcohol abuse. In light of this new evidence and the Court's conclusion that the ALJ failed  
19 to properly determine whether plaintiff's limitations would remain if he stopped abusing  
20 alcohol, remand for further administrative proceedings is appropriate. On remand, the ALJ  
21 should reevaluate the medical evidence, along with any updated medical evidence plaintiff may  
22 submit, in considering what limitations, if any, plaintiff would continue to experience if his

01 alcohol abuse ceased. If warranted, the ALJ should obtain testimony from a medical expert as  
02 to the effect on plaintiff's claimed mental impairments if he were to abstain from alcohol abuse.

03 B. Credibility

04 Plaintiff alleges that the ALJ erred by failing to provide any clear and convincing  
05 evidence for rejecting his testimony. Dkt. No. 17 at 20. Plaintiff also contends that the ALJ  
06 failed to adequately explain why he was credible in describing his symptoms while he was  
07 using alcohol but not credible when describing his symptoms when he was sober. *Id.*

08 A determination of whether to accept a claimant's subjective symptom testimony  
09 requires a two-step analysis. 20 C.F.R. § 404.1529; *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th  
10 Cir. 1996). First, the ALJ must determine whether there is a medically determinable  
11 impairment that reasonably could be expected to cause the claimant's symptoms. *Id.* Once a  
12 claimant produces medical evidence of an underlying impairment, the ALJ may not discredit  
13 the claimant's testimony as to the severity of symptoms solely because they are unsupported by  
14 objective medical evidence. *Bunnell v. Sullivan*, 947 F.3d 341, 343 (9th Cir. 1991) (en banc);  
15 *Reddick*, 157 F.3d at 722. Absent affirmative evidence showing that the claimant is  
16 malingering, the ALJ must provide "clear and convincing" reasons for rejecting the claimant's  
17 testimony. *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at 722.

18 When evaluating a claimant's credibility, the ALJ must specifically identify what  
19 testimony is not credible and what evidence undermines the claimant's complaints; general  
20 findings are insufficient. *Id.* The ALJ may consider "ordinary techniques of credibility  
21 evaluation" including a reputation for truthfulness, inconsistencies in testimony or between  
22 testimony and conduct, daily activities, work record, and testimony from physicians and third

01 parties concerning the nature, severity, and effect of the symptoms of which he complains. *Id.*

02 Here, the ALJ found that “the claimant’s medically determinable impairments could  
03 reasonably be expected to produce some of her alleged symptoms; however, the claimant’s  
04 statements concerning the intensity, persistence and limiting effects of these symptoms are not  
05 entirely credible to the extent they are inconsistent with the residual functional capacity  
06 assessment.” (AR at 24.)

07 Because this case is being remanded for reconsideration of the medical evidence, and  
08 the Court has found that credibility determinations are inescapably linked to conclusions  
09 regarding medical evidence, 20 C.F.R. § 404.1529, the ALJ’s credibility finding is also  
10 reversed and the issue remanded. After re-evaluating the medical evidence of record, the ALJ  
11 will be in a better position to evaluate plaintiff’s credibility. On remand, the ALJ should  
12 properly assess plaintiff’s testimony, and provide clear and convincing reasons for rejecting it  
13 should such a conclusion be warranted.

14 C. RFC Assessment

15 As discussed above, the ALJ erred in his treatment of the medical evidence requiring  
16 remand. Accordingly, on remand, after properly evaluating the medical evidence, the ALJ  
17 will reevaluate plaintiff’s RFC. If the ALJ’s RFC assessment is revised, the ALJ will also call  
18 a vocational expert (“VE”) to testify about jobs that may exist with a properly framed  
19 hypothetical that incorporates all of plaintiff’s limitations.

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02 V. CONCLUSION

03 For the foregoing reasons, the Commissioner's decision is REVERSED and  
04 REMANDED for further administrative proceedings not inconsistent with the Court's  
05 instructions. A proposed order accompanies this Report and Recommendation.

06 DATED this 18th day of August, 2011.

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09 Mary Alice Theiler  
10 United States Magistrate Judge  
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